STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 14, 2010
v	No. 291218 Wayne Circuit Court
ARMOND NORFLEET, Defendant-Appellant.	LC No. 08-010490-FH

Before: OWENS, P.J., and WHITBECK and FORT HOOD, JJ.

PER CURIAM.

Defendant Armond Norfleet appeals as of right his jury conviction for attending a dogfight.[1] He was tried jointly with Claude Smith, who was charged with being the referee at the fight; however, the jury found Smith not guilty. The trial court sentenced Norfleet to two years' probation, with the first four months to be served in the Wayne County Jail. We affirm.

I. BASIC FACTS

Wayne County Sheriff's Department Undercover Officer Shontae Jennings testified that on July 13, 2008, she went to a house on 263 Nevada, in Detroit, Michigan, to investigate a possible dogfight. When she arrived, there were 6 to 8 people in the backyard. Officer Jennings went into a detached garage and observed a square "arena" and a "weighing station." After leaving the garage, Officer Jennings was shown a pitbull dog that was going to fight that night. Officer Jennings then waited in the backyard, observing as more people arrived, until they numbered about 50 or 60. Officer Jennings observed the other people "[s]moking marijuana, drinking, getting dogfight bets, [and] talking about previous dog fights." Officer Jennings testified that she saw Norfleet and Smith among the people in the backyard.

After several hours of waiting, Officer Jennings then watched as the dogfight preparations began. She explained that she saw another pitbull brought into the backyard. Each dog was then washed with a milk solution to rinse off any chemicals that might discourage the other dog from biting. After the washing, one of the dogs was placed inside the arena, and people continued making bets. Officer Jennings also explained that people paid a $30-$35

[1] MCL 750.49(2)(f).

entrance fee as they entered the garage. She testified that she waited until everyone else was inside the garage before she went in; she believed that she was the last person to enter because she did not recall anyone coming in behind her.

Once inside the garage, Officer Jennings had trouble seeing the arena, so she was allowed to move to the front of the crowd to watch the fight. She identified Smith as the referee. Officer Jennings testified that she also saw Norfleet in the garage. According to Officer Jennings, Smith read the rules and then the fight began. Officer Jennings then text messaged Lieutenant Walter Epps (whom she had been updating by text message all along) that the fight had begun. Shortly thereafter, a response team raided the garage. When the raid team entered, they yelled, "This is a raid. Everybody, lie down[.]" However, most of the people ran.

Sergeant Tyrone Jackson testified that he was assigned to the raid unit on the night of the dogfight. He was responsible for coordinating the outside perimeter to prevent suspects from escaping. Sergeant Jackson explained that he had eight to ten officers located around the perimeter. According to Sergeant Jackson, when the raid team went into the backyard, he stayed out in front of the house, and, after he heard the raid team announce the raid, he saw people scattering everywhere from the backyard; it was a chaotic scene. Sergeant Jackson was able to detain three people, including Norfleet. Sergeant Jackson testified that he caught Norfleet as he was running from a yard just west of the address in question.

Mark Ramos, a senior investigator for the Michigan Humane Society, was qualified as an expert in the area of dog fighting. He went to the scene of the dogfight on July 14, 2008, and took photographs. At trial, Ramos explained that the photographs depicted dog-fighting equipment, including the washing items and the arena. Ramos testified that he also removed one of the dogs from the location when he went to the scene. Ramos explained that the dog had "active wounds[,]" including injuries to "his top muzzle, his head, [and] the side of his mouth, . . . his neck and lower part of the chest." Ramos testified that the dog's injuries were bite wounds. The dog also had an open would on his leg and "significant scarring." Ramos testified that the dog's injuries were consistent with dog fighting. Ramos testified that three days later he received a call from the sheriff's department, asking him to pick up the other dog from a veterinarian's clinic. There were no wounds on the second dog's face, but the dog had a gunshot wound. It was stipulated that a deputy shot this dog when it ran from the scene.

The jury found Norfleet guilty of attending the dogfight. Norfleet now appeals.

II. RIGHT TO CONFRONTATION

A. STANDARD OF REVIEW

Norfleet argues that an impound receipt for a vehicle that allegedly belonged to him contained hearsay information and violated his right to confrontation.

Generally, whether a defendant was denied his Sixth Amendment right to confrontation is a constitutional question that this Court reviews de novo.[2] However, unpreserved constitutional error is subject to review for plain error that affected a defendant's substantial rights.[3] A plain error affected a defendant's substantial rights when it caused prejudice that affected the outcome of the proceedings.[4] But even if a plain error is found to have affected the defendant's substantial rights, reversal is warranted only if that error resulted in conviction of an innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings.[5] Moreover, even if a constitutional error is found, this Court need not reverse if the error is harmless beyond a reasonable doubt.[6]

B. UNDERLYING FACTS

Corporal David Rahn was part of the raid unit on the night of the dogfight. He was responsible for processing vehicles that were seized. During trial, he identified a receipt that he filled out for a vehicle that was processed at the location of the dogfight. After his initial identification of the receipt, the prosecution moved to admit the receipt into evidence. Neither counsel for Norfleet nor Smith objected, and the trial court admitted the receipt into evidence. The prosecution then proceeded to question Corporal Rahn regarding the document.

Corporal Rahn testified that the receipt showed Norfleet's name and also contained his signature. On cross-examination, Corporal Rahn stated that he did not run the vehicle's identification number, but that he "just ran the plate." But he could not recall to whom the plate was registered. Corporal Rahn also confirmed that the receipt contained a driver's license number, but he did not know who filled in that information; he assumed that it was filled in by another officer, who likely also retrieved the vehicle's keys from Norfleet.

Corporal Rahn explained that if Norfleet had denied ownership of the vehicle, he would have written, "Refused," on the receipt; however, Norfleet signed the document.

C. ANALYSIS

At the outset, we address the prosecution's contention that Norfleet's counsel waived this issue by stating that he had no objection to admission of the receipt into evidence. However, we disagree with the prosecution's framing of this issue as simply an evidentiary challenge. Although Norfleet does challenge the admission of the receipt into evidence, he does so by

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[2] *People v Breeding*, 284 Mich App 471, 479; 772 NW2d 810 (2009).

[3] *People v Shafier*, 483 Mich 205, 219; 768 NW2d 305 (2009); *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

[4] *Shafier*, 483 Mich at 219-220.

[5] *Id*. at 220.

[6] *People v McPherson*, 263 Mich App 124, 131; 687 NW2d 370 (2004).

asserting a violation of his constitutional right to confrontation. Under these circumstances, Norfleet must have personally waived this constitutional right, which he did not do.[7]

For evidence of testimonial, out-of-court statements to be admissible against a defendant, the declarant must be unavailable and the defendant must have had a prior opportunity for cross-examination of the declarant.[8] The Confrontation Clause does not bar the use of out-of-court testimonial statements for purposes other than establishing the truth of the matter asserted.[9] Statements are testimonial where the "primary purpose" of the statements or the questioning that elicits them "is to establish or prove past events potentially relevant to later criminal prosecution."[10]

In arguing that his right to confrontation was violated, Norfleet relies on *Melendez-Diaz v Massachusetts*[11] and *People v Lonsby*,[12] in which the United States Supreme Court and this Court each held that information contained in laboratory reports implicated a defendant's right to confrontation and required that the laboratory analysts who prepared the information testify at trial. In those cases, the Courts reasoned that the reports were testimonial because it was reasonably expected that the information contained in the reports would be used in a prosecutorial manner—that is, used to establish the elements of a crime at a later trial.[13]

However, we find the present facts more analogous to those in *People v Jambor*.[14] In that case, the defendant argued that fingerprint cards created during investigation of a break-in constituted inadmissible hearsay.[15] This Court explained that the hearsay rule exempts business records, except when those records are prepared "in anticipation of litigation."[16] This Court then held that, although the fingerprint cards were prepared "with the ultimate goal of identifying a suspect in the break-in," the fingerprint cards were admissible as business records because they were not prepared "specifically in anticipation of litigation against defendant"; rather they "were

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[7] *People v Buie*, 285 Mich App 401, 418; 775 NW2d 817 (2009); *People v Lawson*, 124 Mich App 371, 374, 376; 335 NW2d 43 (1983).

[8] *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004); *McPherson*, 263 Mich App at 132.

[9] *McPherson*, 263 Mich App at 133.

[10] *Davis v Washington*, 547 US 813, 822; 126 S Ct 2266, 2274; 165 L Ed 2d 244 (2006).

[11] *Melendez-Diaz v Massachusetts*, ___ US ___; 129 S Ct 2527; 174 L Ed 2d 314 (2009).

[12] *People v Lonsby*, 268 Mich App 375; 707 NW2d 610 (2005).

[13] *Melendez-Diaz*, 129 S Ct at 2532 ("The fact in question is that the substance found in the possession of Melendez-Diaz and his codefendants was, as the prosecution claimed, cocaine—the precise testimony the analysts would be expected to provide if called at trial."); *Lonsby*, 268 Mich App at 391, 393 ("Jackson performed her analysis and testing of the rape kit and swimsuits with the ultimate goal of uncovering evidence for use in a criminal prosecution.").

[14] *People v Jambor*, 273 Mich App 477; 729 NW2d 569 (2007).

[15] *Id*. at 479-480.

[16] *Id*. at 481-482, citing MRE 801, MRE 802 and MRE 803(6).

prepared during the normal course of investigating a crime scene."[17] This Court then held that the fingerprint cards were also admissible under the public records hearsay exception.[18] This Court explained that, although the fingerprint cards "contained 'matters observed by police officers' to the extent that [they] identified the locations at which the fingerprints were found[,]" the fingerprint cards were prepared as part of a routine police investigation of a break-in and contained only objective information.[19] This Court then went on to address the Confrontation Clause and noted that the United Supreme Court in *Crawford v Washington* recognized that business records are not testimonial.[20]

Here, the receipt in question was not prepared specifically in anticipation of litigation against Norfleet. Rather it was prepared during the normal course of investigating a crime. As Corporal Rahn testified, the receipt was prepared simply to document seizure of a vehicle that was ticketed for nuisance abatement. As he stated, "That is a receipt, not an admission of guilt, for his vehicle." And, as Norfleet himself argues in his brief on appeal, his mere presence in the area was not alone proof that he was guilty of attending a dogfight. Indeed, unlike *Jambor*, where fingerprint cards were prepared with the ultimate goal of identifying a suspect in the break-in, there is no indication here that the receipt was specifically prepared with the primary purpose or ultimate goal of identifying dogfight attendees. It merely served as a routine record of the seizure of property. Moreover, the receipt contained only objective information. Therefore, we conclude that admission of the receipt did not violate Norfleet's right to confrontation.

Additionally, as we will explain, *infra*, even if the trial court did improperly admit the receipt there was other admissible evidence presented at trial regarding Norfleet's presence at the dogfight. Accordingly, Norfleet cannot demonstrate that any plain error affected his substantial rights, and we will not reverse on the basis of this issue.

III. GREAT WEIGHT OF THE EVIDENCE

A. STANDARD OF REVIEW

Norfleet argues that we should vacate his conviction because the jury entered it against the great weight of the evidence. Generally, this Court reviews for an abuse of discretion a trial court's grant or denial of a new trial on the ground that the verdict was against the great weight of the evidence.[21] However, where, as here, a defendant fails to preserve an objection regarding

[17] *Id*. at 483-484.

[18] *Id*. at 486, citing MRE 803(8).

[19] *Id*. at 485-486.

[20] *Id*. at 487, citing *Crawford*, 541 US at 56; see also *id.* at 76 (REHNQUIST, C.J., concurring, stating that public records are also not testimonial).

[21] *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008).

the weight of the evidence by moving for a new trial, we limit our review to plain error that affected the defendant's substantial rights.[22]

B. LEGAL STANDARDS

"A trial court may grant a motion for a new trial based on the great weight of the evidence only if the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand."[23] The jury's verdict should not be set aside if there is competent evidence to support it; the trial court cannot substitute its judgment for that of the factfinder.[24] "Conflicting testimony and questions of witness credibility are generally insufficient grounds for granting a new trial."[25] "The hurdle that a judge must clear in order to overrule a jury and grant a new trial 'is unquestionably among the highest in our law.'"[26]

C. APPLYING THE STANDARDS

Norfleet's argument is essentially that his conviction was against the great weight of the evidence because Officer Jennings' identification of him was not credible. Norfleet attempts to call Officer Jennings' testimony into question by pointing out that, during cross-examination, she admitted that she had misidentified a certain man as being a principal participant. Norfleet also points out that, in her investigation report, Officer Jennings described the referee as having a "light complexion," while Smith, who she identified as the referee, actually had a dark complexion. Norfleet further points out that a photo taken of the scene on the night of the incident showed that it was dark and that it was not possible to identify the persons in the photo. Norfleet also points to Officer Jennings' own testimony that the garage was packed with people, that she had never seen nor met Norfleet before the incident in question, that she never specifically identified Norfleet in her text messages or in her report, and that she did not actually see Norfleet walk into the garage nor did she recall seeing him pay an entrance fee.

However, with respect to Officer Jennings' identification of Smith, she explained on cross-examination that whether someone could be described as "light-skinned" was a matter of opinion. Further, she consistently maintained that she remembered seeing Norfleet in the garage when the dogfight was occurring; when asked how she remembered Norfleet being there, Officer Jennings responded, "I remember his face."

Officer Jennings also testified that, while she was waiting in the backyard for the fight to start, she saw Norfleet among the people in the backyard. She explained that there was a floodlight attached to the back of the house and that the area was "[v]ery well lit." Officer Jennings also testified that there were "regular incandescent lights" in the garage and that it was

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[22] *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003).

[23] *Unger*, 278 Mich App at 232.

[24] *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999).

[25] *Unger*, 278 Mich App at 232.

[26] *Id.*, quoting *People v Plummer*, 229 Mich App 293, 306; 581 NW2d 753 (1998).

"[v]ery well lit." She confirmed that she did not have any problems seeing anything inside the garage. Mark Ramos, the senior investigator for the Michigan Humane Society, similarly testified that the there was "bright light" in the garage, and he confirmed that he had "very good visibility inside the garage." Moreover, Smith also testified that the garage was "well lit."

Additionally, Sergeant Jackson testified that he caught Norfleet as he was running from a yard just west of the address in question.

Considering the evidence as a whole and leaving any credibility issues to the province of the jury, we conclude that the evidence does not preponderate so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. Rather, there was competent evidence on the record to support Norfleet's presence at the dogfight. Norfleet cannot demonstrate that any plain error affected his substantial rights, and we will not vacate his conviction on the basis of this issue.

IV. JURY INSTRUCTION

Norfleet argues that he was denied due process of law because the trial court incorrectly instructed the jury regarding the elements of the crime of attending a dogfight. However, the trial court specifically asked defense counsel if he was satisfied with the jury instructions as given, and defense counsel stated, "On behalf of Mr. Norfleet, we're satisfied, your Honor." Such statement of satisfaction waives any alleged instructional error on appeal.[27]

Moreover, to the extent that Norfleet argues that his defense counsel was ineffective for failing to object to the erroneous instruction, we disagree.

During the charge to the jury, the trial court instructed them as follows: "The prosecution must prove beyond a reasonable doubt that Armond Norfleet was present at 263 Nevada in Detroit, Michigan where an exhibition for the fighting or baiting of an animal was occurring, knowing that said exhibition was taking place and/or about to take place." MCL 750.49(2)(f) states, "A person shall not knowingly . . . [b]e present at a building, shed, room, yard, ground, or premises where preparations are being made for an exhibition described in subdivisions (a) to (d), or be present at the exhibition, knowing that an exhibition is taking place or about to take place." "[A]n exhibition described in subdivisions (a) to (d)," includes fighting or baiting an animal.[28]

Norfleet argues that the instruction was erroneous because the trial court should have instructed the jury that he was guilty "only if he was at the actual dog fight inside the garage." However, we do not agree that such specificity was necessary. Rather, we conclude that the trial court's instructions fairly presented the issues to be tried and sufficiently protected Norfleet's

[27] *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002).

[28] MCL 750.49(2)(b).

rights.[29] Therefore, defense counsel "cannot be faulted for failing to raise an objection . . . that would have been futile."[30]

We affirm.

/s/ Donald S. Owens
/s/ William C. Whitbeck
/s/ Karen Fort Hood

[29] *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001).

[30] *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).